

The Provisional Understanding Regarding Deep Seabed Matters: An Ill-Conceived Regime for U.S. Deep Seabed Mining

Steven J. Molitor

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Molitor, Steven J. (1987) "The Provisional Understanding Regarding Deep Seabed Matters: An Ill-Conceived Regime for U.S. Deep Seabed Mining," *Cornell International Law Journal*: Vol. 20: Iss. 1, Article 7.
Available at: <http://scholarship.law.cornell.edu/cilj/vol20/iss1/7>

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**THE PROVISIONAL UNDERSTANDING REGARDING
DEEP SEABED MATTERS: AN
ILL-CONCEIVED REGIME FOR U.S.
DEEP SEABED MINING**

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I. INTRODUCTION

During the past two decades, an intense economic and ideological controversy has developed regarding the appropriate legal regime for deep seabed mining. The apparently accessible abundance of ferro manganese nodules¹ on the ocean floor has triggered hopes that the seabed will one day be an important source of the world's minerals.² The minerals contained in the seabed represent a potentially crucial opportunity for the industrialized nations to decrease their dependence on land-based mines in the Third World.³ As interest in the potential of seabed mining grew, the dearth of international guidelines governing such mining became increasingly apparent.

Recognizing the growing need for a comprehensive multilateral ocean law regime, a significant majority of nations signed the United Nations Convention on the Law of the Sea (the "Convention") in 1982.⁴ The United States, however, chose not to sign the Convention. Instead, the United States, together with seven other Western industrialized countries,⁵ entered into the Provisional Understanding Regarding Deep Seabed Matters (the "Provisional Understanding").⁶ By signing the Provisional Understanding, the United States sacrificed the advantageous mining opportunities and global stability offered by the

1. "The nodules consist of rounded blackish aggregations of hydrated oxides of iron and manganese, as well as smaller amounts of cobalt, copper, and nickel." Collins, *Mineral Exploitation of the Seabed: Problems, Progress, and Alternatives*, 12 NAT. RESOURCES L. 599, 605 (1979). They are generally one to twenty centimeters in diameter, round or oval shaped, and lie on the seabed surface or are partially embedded in subsea mud. *Id.*

2. "Interest in nodules peaked in the mid-1970s, with international consortiums preparing for mining, commercial operations predicted by the mid-1980s, and literally thousands of reports and reviews circulating in scientific, trade, and popular media." Manheim, *Marine Cobalt Resources*, 232 SCI. 600, 600 (1986). By the early 1980s, however, in the face of weak metal markets and the political uncertainties caused by the U.S. decision not to sign the United Nations Convention on the Law of the Sea, *see infra* note 4, prospects for commercial seabed mining receded, and "nodule mining consortiums reduced operations to skeletal levels or disbanded them altogether." Manheim, *supra*, at 600.

3. *See* Collins, *supra* note 1, at 611. For example,

Of the minerals contained in the nodules, the United States presently imports 99 percent of its manganese, 91 percent of its nickel, 98 percent of its cobalt, and 18 percent of its copper needs. . . . The United States imports manganese from Brazil, Gabon, Zaire, France and India; cobalt from Zaire; and copper from Chile, Peru, and Canada. Of these sources, only Canada and France might qualify as a 'secure' one [sic].

Id. Western Europe and Japan are similarly dependent. *Id.*

4. United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, U.N. Doc. A/CONF.62/122, *reprinted in* 21 I.L.M. 1261 (1982) [hereinafter *Convention*].

5. The parties to the Provisional Understanding are Belgium, France, the Federal Republic of Germany, Italy, Japan, the Netherlands, the United Kingdom, and the United States.

6. Provisional Understanding Regarding Deep Seabed Matters, Aug. 3, 1984, ___ U.S.T. ___, T.I.A.S. No. ___, ___ U.N.T.S. ___, *reprinted in* 23 I.L.M. 1354 (1984) [hereinafter *Provisional Understanding*].

Convention in exchange for the Provisional Understanding's ideological purity. Notwithstanding its ostensive compatibility with free market ideals, the Provisional Understanding is far less favorable to long-term U.S. interests in deep seabed mining than a universally recognized regime such as that established by the Convention.

An overview of the seabed mining controversy is presented in Part I of this Note; the Convention's deep seabed mining regime is outlined in Part II; U.S. objections to the Convention are detailed in Part III; and a response to those objections is offered in Part IV. The Provisional Understanding's seabed mining regime is described in Part V; and the agreement's shortcomings are analyzed in Part VI, as are the current status of the United States with regard to seabed mining, and its future prospects in the area.

A. THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

The Third United Nations Conference on the Law of the Sea ("UNCLOS III") devoted nearly a decade to drafting a comprehensive convention to govern virtually all aspects of ocean law.⁷ The Convention was overwhelmingly adopted in New York on April 30, 1982 by a vote of 130 to 4, with 17 abstentions.⁸ On July 9, 1982, however, in an abrupt change in U.S. ocean policy,⁹ President Reagan announced that the United States would not sign the Convention.¹⁰ The Administration's objections to the Convention focused almost exclusively on the agreement's seabed mining provisions.¹¹ Specifically, the United States objected to the provisions of the Convention

7. Katz, *A Method for Evaluating the Deep Seabed Mining Provisions of the Law of the Sea Treaty*, 7 YALE J. WORLD PUB. ORD. 114, 114 (1980); Pardo, *The Convention on the Law of the Sea: A Preliminary Appraisal*, 20 SAN DIEGO L. REV. 489, 489 (1983).

8. U.N. Dep't of Pub. Information, Law of the Sea Conference, Eleventh Session, U.N. Press Release SEA/494, at 10 (Apr. 30, 1982). The Convention was rejected by Israel, Turkey, the United States, and Venezuela. The countries abstaining included Belgium, the Federal Republic of Germany, Italy, Luxembourg, Mongolia, the Netherlands, Spain, Thailand, and the United Kingdom, together with the Eastern European countries, except Romania. On December 10, 1982, 117 countries and a U.N. body representing Namibia and the Cook Islands signed the treaty; 23 countries, including the United States, attended the signing ceremony in Jamaica but did not sign; and 24 countries did not attend the ceremony. N.Y. Times, Dec. 11, 1982, at A1, col. 2.

9. See N.Y. Times, Mar. 9, 1981, at A1, col. 1; see also *infra* note 18.

10. Richardson, *The United States Posture Toward the Law of the Sea Convention: Awkward but not Irreparable*, 20 SAN DIEGO L. REV. 505, 505 (1983).

11. See Statement on United States Actions Concerning the Conference on the Law of the Sea, July 9, 1982, 2 PUB. PAPERS: RONALD REAGAN 911, 911 (1982); Statement on United States Participation in the Third United Nations Conference on the Law of the Sea, Jan. 29, 1982, 1 PUB. PAPERS: RONALD REAGAN 92, 92 (1982) ("Our review has concluded that while most provisions of the draft Convention are acceptable and consistent with United States interests, some major elements of the deep seabed mining regime are not acceptable."); see also Malone, *The United States and the Law of the Sea*, 24 VA. J. INT'L L. 785, 788 (1984).

applying the "common heritage of mankind" doctrine to seabed resources,¹² an approach that the Reagan administration viewed as inimical to U.S. geopolitical and economic interests and free market ideology.

The Administration's objections to the Convention were both practical and ideological.¹³ Critics of the current U.S. position, however, have argued that the Convention regime adequately addresses many of the Administration's practical concerns, and will allow the initiation and stabilization of profitable seabed mining.¹⁴ Furthermore, these critics contend that all the parties involved must make ideological compromises in creating wholly new guidelines for cooperative conduct by over 150 nations.¹⁵

Nevertheless, with the apparent failure of the Convention, the United States and seven like-minded industrialized nations sought an international regime that would lend stability to their seabed mining activities. Frustrated by Convention provisions which they believed unfairly and unnecessarily granted a disproportionate voice to developing countries that have little or no investment in seabed mining operations, these eight nations sought a seabed mining regime more wholly in keeping with their economic interests. The Provisional Understanding parties desired an agreement that would minimize bureaucratic interference by Third World countries hoping to share the profits but not the risks of seabed mining operations. The parties drafted a streamlined treaty that imposed upon each signatory an obligation of noninterference with each party's seabed activities. The Provisional Understanding is devoid of any provision calling for an international governing body and rejects any attempt to encourage Third World involvement in seabed mining.

B. THE POTENTIAL IMPACT OF SEABED MINING ON DEVELOPED AND DEVELOPING COUNTRIES

Currently, the industrialized countries consume large quantities of the minerals found on the seabed; these minerals are obtained pri-

12. See *infra* text accompanying notes 21-24.

13. Bandow, *UNCLOS III: A Flawed Treaty*, 19 SAN DIEGO L. REV. 475, 477-86 (1982).

14. See, e.g., Richardson, *Superpowers Need Law: A Response to the United States Rejection of the Law of the Sea Treaty*, 17 GEO. WASH. J. INT'L L. & ECON. 1 (1982) (the author, Former United States Ambassador at Large and Special Representative of the President to the Law of the Sea Conference, headed the U.S. delegation to the Law of the Sea Conference from February 1977 to October 1980). "[T]here is no serious prospect that the objectionable features will be involved." *Id.* at 10; see also *infra* text accompanying notes 133-54.

15. See Richardson, *supra* note 14.

marily from land-based mining operations in developing nations.¹⁶ Profitable seabed mining would give the industrialized West greater economic and political flexibility by reducing its dependence on terrestrial mines in the Third World. Successful seabed mining will further advance the interests of consuming countries by increasing the supply of minerals and lowering their prices.

Any gains by consuming countries, however, will be accompanied by relatively greater losses to the Third World's land-based producers. Seabed mining by the developed countries not only will increase the supply of minerals and thus reduce their prices, but also will redirect Western investments theretofore earmarked to expand the production capacity of terrestrial mines. The potential impact of seabed mining on developed and developing nations causes the often bitter debate regarding the appropriate legal regime to govern seabed mining.

C. THE LEGAL DOCTRINE APPLICABLE TO THE SEABED: FREEDOM OF THE HIGH SEAS OR THE COMMON HERITAGE OF MANKIND?

The polarization of this controversy is reflected in the disagreement over the appropriate legal doctrine to govern seabed mining activity: "freedom of the high seas" or "the common heritage of mankind."¹⁷ The United States and a few other Western nations believe that the "freedom of the high seas" doctrine should govern the seabed.¹⁸ This doctrine, based on the principle of *res nullius*,¹⁹ states that although no nation owns the seabed, it is susceptible to appropria-

16. See *supra* note 3.

17. See, e.g., Mashayekhi, *The Present Legal Status of Deep Seabed Mining*, 19 J. WORLD TRADE L. 229 (1985); Van Dyke & Yuen, "Common Heritage" v. "Freedom of the High Seas": Which Governs the Seabed?, 19 SAN DIEGO L. REV. 493 (1982).

18. The Reagan Administration's unequivocal position regarding the applicability of the freedom of high seas principle to the seabed has not always been the official U.S. position. President Johnson first put forth the U.S. position in an oft-quoted speech delivered in 1966: "We must be careful to avoid a race to grab and to hold the lands under the high seas. We must ensure that the deep seas and the ocean bottoms are, and remain, the legacy of all human beings." Remarks at the Commissioning of the Research Ship *Oceanographer*, July 13, 1966, 2 PUB. PAPERS: LYNDON B. JOHNSON 722, 724 (1966); see also Richardson, *Law in the Making: A Universal Regime for Deep Seabed Mining?*, 53 N.Y. ST. B.J. 408, 410 & n.3 (1981). Within three years, the world community had accepted the common heritage concept. See Declaration of Principles Governing the Seabed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction, G.A. Res. 2749 (XXV), 25 U.N. GAOR Supp. (No. 28) at 24, U.N. Doc. A/8028 (1970) (approved by a vote of 108 to 0). "The sea-bed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction . . . as well as the resources of the area, are the common heritage of mankind." *Id.* Likewise, President Nixon seemed to have embraced the common heritage notion. In a speech renouncing all sovereign rights to the seabed and its resources and announcing the U.S. policy of helping to establish an international machinery to administer the licensing of seabed exploration and exploitation, President Nixon stated: "The international seabed would be the common heritage of mankind and no state could exercise sovereignty or sovereign rights over this area or its resources." Nelson,

tion.²⁰ Traditionally, the "freedom of the high seas" doctrine has governed, *inter alia*, fishing and navigation.

The great majority of nations and many Western commentators, however, contend that the "common heritage of mankind" concept, not the "freedom of the high seas" doctrine should govern the seabed. Based on the principle of *res communes*,²¹ this doctrine provides the foundation for the argument that extra-jurisdictional seabed resources should be apportioned only according to rules that ensure exploitation of the seabed in the common interest of all nations.²² There are four generally recognized elements of the common heritage doctrine: first, no nation can apportion the area to which the doctrine applies; second, all countries must share in the area's management; third, all countries must actively share in the benefits derived from the area's resources; and fourth, the area must be reserved for peaceful purposes.²³ Proponents of the common heritage doctrine note that seabed mining, unlike fishing or navigation, can occur only when each miner has exclusive rights to a specific area. In seabed mining, the mining sites cannot overlap; therefore, contrary to the principle of *res nullius*, nations must exclude each other in order to mine the seabed.²⁴

Thus, there is presently no consensus as to the appropriate doctrine to govern the seabed. Beyond the impediments it creates to formulating a treaty acceptable to all parties, the "which doctrine" debate alone has little practical impact on the attractiveness or availability of investment in seabed mining. Universal agreement on the "freedom of the high seas" principle simply would encourage each mining enterprise to rush to claim specific mining areas. Such a situation, however, would be too uncertain for investors to risk billions of dollars on projects having no assurance of uninterrupted mining rights.²⁵ Under a "freedom of the high seas" regime, hesitancy by investors is particularly likely given the uncertain outcome of any International Court of Justice decision on the legality of seabed mining

Contemporary Practice of the United States Relating to International Law, 65 AM. J. INT'L L. 179, 180 (1971).

19. "The property of nobody." BLACK'S LAW DICTIONARY 1174 (5th ed. 1979).

20. See Larschan & Brennan, *The Common Heritage of Mankind Principle in International Law*, 21 COLUM. J. TRANSNAT'L L. 305, 312 (1983).

21. "[T]hings common to all; that is, those things which are used and enjoyed by everyone, even in single parts, but can never be exclusively acquired as a whole, e.g., light and air." BLACK'S LAW DICTIONARY 1173 (5th ed. 1979).

22. See Larschan & Brennan, *supra* note 20.

23. Goedhuis, *Some Recent Trends in the Interpretation and the Implementation of the Rules of International Space Law*, 19 COLUM. J. TRANSNAT'L L. 213, 219 (1981).

24. See Van Dyke & Yuen, *supra* note 17, at 509-11.

25. Biblowit, *Deep Seabed Mining: The United States and the United Nations Convention on the Law of the Sea*, 58 ST. JOHN'S L. REV. 367, 377 (1984); Molitor, *The U.S. Deep Seabed Mining Regulations: The Legal Basis for an Alternative Regime*, 19 SAN DIEGO L. REV. 599, 601 (1981); Richardson, *supra* note 10, at 509.

outside of the Convention.²⁶ Notwithstanding the Convention's adoption of the "common heritage of mankind" doctrine, the United States should sacrifice its rigid ideological requirements and accept the potential benefits of the Convention to avoid the chilling effect on investment of rejecting the Convention and supporting the "freedom of the high seas" doctrine.

II. THE CONVENTION'S DEEP SEABED MINING REGIME

A. SCOPE, ADMINISTRATION, AND GENERAL PRINCIPLES

Part XI of the Convention,²⁷ which addresses seabed mining, governs "activities in the Area."²⁸ The Convention defines the "Area" as "the sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction."²⁹ Part XI covers "all activities of exploration for, and exploitation of, the resources of the Area."³⁰

Section 4 of Part XI³¹ creates "the Authority," an international administrative organization to govern activities in the Area.³² The Authority is based on the sovereign equality of all its members.³³ The Authority's principle organs are an Assembly, a Council, and a Secretariat.³⁴ In addition, the Authority is empowered to establish "the Enterprise," an international business organization with the authority to engage in activities in the Area, concurrently with state and private operators,³⁵ pursuant to the Convention's "parallel system."³⁶

Section 2 of Part XI³⁷ delineates a number of principles governing the Area. The Convention adopts the "common heritage of mankind" doctrine with regard to "the Area and its resources."³⁸ Section 2 also prohibits any activities in the Area not conducted pursuant to the Convention, and voids all claims of title to minerals recovered, except minerals recovered in accordance with the Convention.³⁹ Activities in the Area conducted under unilateral domestic legislation⁴⁰ authorizing

26. See *infra* text accompanying notes 165-68.

27. Convention, *supra* note 4, arts. 133-191.

28. *Id.* art. 134, para. 2.

29. *Id.* art. 1, para. 1(1).

30. *Id.* art. 1, para. 1(3).

31. *Id.* arts. 156-191.

32. *Id.* arts. 156-158.

33. *Id.* art. 157, para. 3.

34. *Id.* art. 158, para. 1.

35. *Id.* art. 158, para. 2; art. 170, para. 1.

36. See *infra* text accompanying notes 68-83.

37. Convention, *supra* note 4, arts. 136-149.

38. *Id.* art. 130.

39. *Id.* arts. 137-138.

40. See, e.g., Deep Seabed Hard Mineral Resources Act of 1980, 39 U.S.C. §§ 1401-1473 (1980) (USA); Exploration and the Exploitation of the Mineral Resources of the Deep Sea-bed, Law No. 81-1135 of 23 Dec. 1981, 1981 J.O. 3499-500, reprinted in 21 I.L.M. 808 (1982) (France); Act of Interim Regulation of Deep Seabed Mining 1980 BGB1.I 1457,

development outside of the Convention would therefore appear to violate Section 2.⁴¹

The remaining articles of the Section outline various additional principles. Such principles include a declaration that activities in the Area shall be carried out for the benefit of mankind as a whole⁴² and provide for an equitable sharing of economic benefits derived from the Area.⁴³ Other articles dictate that the Area be used exclusively for peaceful purposes,⁴⁴ and provide for scientific research,⁴⁵ the transfer of technology,⁴⁶ and the protection of the marine environment,⁴⁷ and human life.⁴⁸ Furthermore, the Convention requires that any activities in the Area must accommodate other activities in the marine environment,⁴⁹ that the developing states participate in seabed mining,⁵⁰ and that archaeological and historical objects found in the Area be preserved.⁵¹

B. GUIDELINES FOR DEVELOPMENT OF THE AREA

Section 3 of Part XI⁵² enumerates several policies and restrictions relating to development of the Area's resources. Article 150 sets out ten policies relating to Area development.⁵³ The apparent conflicts

reprinted in 20 I.L.M. 393 (1981) and Act to Amend the Interim Regulation of Deep Seabed Mining, 1982 BGB1.I, 136, *reprinted in* 21 I.L.M. 832 (1982) (Federal Republic of Germany); Deep Sea Mining (Temporary Provisions) Act, 1981, ch. 53, *reprinted in* 20 I.L.M. 1217 (1981) (United Kingdom); Law on Interim Measures for Deep Seabed Mining [enacted July 20, 1982], *reprinted in* 22 I.L.M. 102 (1983) (Japan); Edict on Provisional Measures To Regulate Enterprises For The Exploration And Exploitation Of Mineral Resources, Ved. Verkh Sov. RSFSR, Apr. 18, 1982, *Izvestia*, Apr. 1982, at 1, *reprinted in* 21 I.L.M. 551 (1982) (USSR).

41. See *infra* notes 164-65 and accompanying text.

42. Convention, *supra* note 4, art. 140, para. 1.

43. *Id.* art. 140, para. 2.

44. *Id.* art. 141.

45. *Id.* art. 143.

46. *Id.* art. 144.

47. *Id.* art. 145.

48. *Id.* art. 146.

49. *Id.* art. 147.

50. *Id.* art. 148.

51. *Id.* art. 149.

52. *Id.* arts. 150-155.

53. *Id.* art. 150. Article 150 provides:

Activities in the Area shall . . . be carried out in such a manner as to foster healthy development of the world economy and balanced growth of international trade, and to promote international co-operation for the over-all development of all countries, especially developing states, and with a view to ensuring:

(a) the development of the resources of the Area;

(b) orderly, safe and rational management of the resources of the Area, including the efficient conduct of activities in the Area and, in accordance with sound principles of conservation, the avoidance of unnecessary waste;

(c) the expansion of opportunities for participation in such activities consistent in particular with articles 144 [transfer of technology] and 148 [participation of the developing states in activities in the Area];

among these policies reflect the divergent goals of the UNCLOS III participants. For example, the first goal, "the development of the resources of the Area,"⁵⁴ may seem to conflict with the goal of protecting developing countries from adverse economic effects that result from Area development.⁵⁵ Such ostensibly contradictory objectives are not fatal flaws. Rather, they represent attempts by the UNCLOS III participants to at least recognize, if not reconcile, their various competing interests and goals.

Article 151 establishes rules that the United States considers particularly objectionable. It provides a twenty-five year interim period during which commercial production of Area resources shall not occur unless the Authority issues a production authorization to the operator.⁵⁶ In addition, Article 151 establishes a formula setting production ceilings for each year of the interim period.⁵⁷

Theoretically, such provisions are incompatible with free market ideology. Nevertheless, it is unlikely that these provisions will ever obstruct commercial seabed development by Western consortia.⁵⁸ The high level of the production ceiling all but precludes any possibility of

(d) participation in revenues by the Authority and the transfer of technology to the Enterprise and developing States as provided for in this Convention;

(e) increased availability of minerals derived from the Area as needed in conjunction with minerals derived from other sources, to ensure supplies to consumers of such minerals;

(f) the promotion of just and stable prices remunerative to producers and fair to consumers for minerals derived both from the Area and from other sources, and the promotion of long-term equilibrium between supply and demand;

(g) the enhancement of opportunities for all States Parties, irrespective of their social and economic systems or geographical location, to participate in the development of the resources of the Area and the prevention of monopolization of activities in the Area;

(h) the protection of developing countries from adverse effects on their economies or on their export earnings resulting from a reduction in the price of an affected mineral, or in the volume of the exports of that mineral, to the extent that such reduction is caused by activities in the Area, as provided in article 151 [production policies];

(i) the development of the common heritage for the benefit of mankind as a whole; and

(j) conditions of access to markets for the imports of minerals produced from the resources of the Area and for imports of commodities produced from such minerals shall not be more favourable than the most favourable applied to imports from other sources.

54. *Id.* art. 150(a).

55. *Id.* art. 150(h).

56. *Id.* art. 151, paras. 2-3.

57. *Id.* art. 151, paras. 3-4. The production limitation will necessarily be in effect only fifteen years. See Richardson, *supra* note 18, at 444 n.21; see also *infra* note 132.

58. See Antrim & Sebenius, *Incentives for Ocean Mining Under the Convention*, in LAW OF THE SEA: U.S. POLICY DILEMMA 79, 91-92 (1983) [hereinafter LAW OF THE SEA]; Bailey, *The Future of the Exploitation of the Resources of the Deep Seabed and Subsoil*, 46:2 LAW & CONTEMP. PROBS. 71, 74 (1983); Richardson, *supra* note 18, at 444; Richardson, *supra* note 14, at 10-12; see also *infra* text accompanying notes 126-41.

restricting development.⁵⁹ Similarly, the technology transfer provision⁶⁰ will probably never be invoked because it requires the Authority to find that the Enterprise cannot purchase needed technology on the open market.⁶¹ Current forecasts indicate that the Enterprise will be able to make such purchases without the aid of mandatory transfer.⁶² Moreover, the Convention requires that any mandatory transfers be made on fair and reasonable commercial terms,⁶³ and the provision for the transfer of technology expires ten years after the Enterprise commences commercial production.⁶⁴

C. THE "PARALLEL SYSTEM": BASIC CONDITIONS OF PROSPECTING, EXPLORATION, AND EXPLOITATION

Annex III of the Convention delineates the "Basic Conditions for Prospecting, Exploration, and Exploitation," and establishes a "parallel system" for Area development. The United States proposed the "parallel system" in 1976 in response to the deadlock between the developed and the developing countries regarding the proper ambit for the Authority's power within the context of a regime founded upon the common heritage concept. The "parallel system" compromise is intended to allow both the developed and the developing nations to concurrently exploit the deep seabed⁶⁵ by assuring that the developing countries receive both the necessary financing⁶⁶ and technology.⁶⁷

At the time of the deadlock, the developed countries acknowledged that the common heritage principle implied some degree of

59. See Antrim & Sebenius, *supra* note 58, at 91-92; Bailey, *supra* note 58, at 74; Richardson, *supra* note 18, at 444; Richardson, *supra* note 14, at 10-12.

60. Convention, *supra* note 4, Annex III, art. 5; see *infra* text accompanying notes 137-41.

61. *Id.* art. 5, para. 3.

62. Antrim & Sebenius, *supra* note 58, at 91-92; see also Bailey, *supra* note 58, at 74-75; Richardson, *supra* note 18, at 444; Richardson, *supra* note 14, at 11; Van Dyke & Teichmann, *Transfer of Seabed Mining Technology: A Stumbling Block to U.S. Ratification of the Law of the Sea Convention?*, 13 OCEAN DEV. & INT'L L.J. 427 (1984); *infra* text accompanying notes 137-41.

63. Convention, *supra* note 4, Annex III, art. 5, para. 3.

64. *Id.* Annex III, art. 5, para. 7.

65. See Secretary Kissinger Discusses U.S. Position on Law of the Sea Conference, 75 DEP'T ST. BULL. 395 (Sept. 27, 1976) (remarks of Secretary Kissinger at UNCLOS III reception, Sept. 1, 1976). "At the last session, the United States proposed the system of parallel access in which, concurrently with any state or private mining of the deep seabeds, a similar site would have to be set aside for the international community to be exploited or mined by the international community." *Id.* at 398.

66. See *id.* "[T]he United States would be prepared to agree to a means of financing the Enterprise in such a manner that the Enterprise could begin its mining operation either concurrently with the mining of state or private enterprises or within an agreed time-span that was practically concurrent." *Id.*

67. See *id.* Secretary Kissinger expressed U.S. willingness to negotiate "provisions for the transfer of technology so that the existing advantage of certain industrial states would be equalized over a period of time." *Id.*

international control over mining operations, but stopped short of envisioning a system in which the Authority itself would carry out mining operations.⁶⁸ Instead, the industrial countries argued that the Authority's role should be limited to licensing and ensuring compliance with regulations controlling seabed mining operations.⁶⁹

In contrast, the Group of 77, a coalition now consisting of over one hundred developing countries⁷⁰ sought "a monolithic parastatal entity for seabed exploitation along the lines of a nationalized industry in a socialist country."⁷¹ That position was based upon the belief that because the resources of the Area are *res communes*, all Area activities should be conducted by an entity controlled by the entire world community.⁷² Clearly, such a regime would have immediately halted plans for the initiation of seabed mining. Essential capital contributions from the developed countries would have been wanting, and the ability to acquire the necessary technology would have been uncertain.⁷³

The parallel system proved acceptable to both the West and the Group of 77, and was incorporated into the Convention as Annex III.⁷⁴ Under this system, state-sponsored private mining, State-party ventures,⁷⁵ and the Enterprise⁷⁶ will carry out activities in the Area.⁷⁷ To advance the goal of concurrent development, private and state sponsored mining ventures must satisfy two requirements not imposed on the Enterprise.⁷⁸ First, they must submit "dual nominations."⁷⁹

68. Richardson, *supra* note 18, at 440.

69. *Id.*

70. See Friedman & Williams, *The Group of 77 at the United Nations: An Emergent Force in the Law of the Sea*, 16 SAN DIEGO L. REV. 555 (1979).

71. Richardson, *supra* note 18, at 440; see also Charney, *The International Regime for the Deep Seabed: Past Conflicts and Proposals for Progress*, 17 HARV. INT'L L.J. 1, 6 (1976):

[The Group of 77] have sought control of the exploitation of the deep seabed through the control of the Authority, giving it full power to take actions they deem necessary to protect their interests. For example, they have sought to provide the Authority with the power to conduct the exploitation of the resource itself to the exclusion of the industry of any particular nation. They have also supported giving the Authority the power to control directly the activities of any entity that it permits to undertake Activities in the Area, to pace the development of the seabed, to set prices, and finally, to provide for protection to land based developing country producers if they suffer from competition with seabed mining.

Id. (footnotes omitted).

72. Richardson, *supra* note 14, at 5.

73. Richardson, *supra* note 18, at 440.

74. See Charney, *The Law of the Deep Seabed Post UNCLOS III*, 63 OR. L. REV. 19, 34 (1984).

75. Convention, *supra* note 4, art. 153, para. 2(b); Annex III, art. 4, para. 1.

76. *Id.* art. 153, para. 2(a).

77. State-sponsored private mining is done by private mining companies under the flag of one or more nations which are party to the Convention. State-party ventures refer to mining done by state mining agencies.

78. See Charney, *supra* note 74, at 34-35.

Each application, other than those submitted by the Enterprise or a developing nation, must cover a total area large enough for two mining operations of approximately equal commercial value.⁸⁰ The Authority then designates one of the sites to the applicant and reserves the other site for the Enterprise or a mining group associated with one or more of the developing states.⁸¹ Second, for a period of ten years⁸² each applicant must provide the Enterprise and developing nations all technology and equipment used to carry out the activities in the Area if such technology and equipment are unavailable on the open market.⁸³

III. THE UNITED STATES' OBJECTIONS TO THE CONVENTION

A. IDEOLOGICAL OBJECTIONS

Critics of the Convention lament what they view as a failure on the part of Western UNCLOS III delegations to emphasize philosophical issues at the Conference.⁸⁴ They argue that this failure invited the Group of 77 to fill the resulting "ideological vacuum" with self-serving economic doctrines designed to guarantee the developing countries a significant role in seabed development.⁸⁵

Any ideological flexibility of U.S. UNCLOS III negotiators during the Carter administration was quickly displaced by the ideological rigidity of Reagan administration diplomats. As a presidential candidate, Mr. Reagan emphasized that the United States must reassert its interests in multilateral negotiations.⁸⁶ Indeed, UNCLOS III was cited as the type of diplomatic weakness that the new President vowed to correct.⁸⁷ After the final negotiating session of the Conference, the United States realized that it would not be able to incorporate desired

79. Convention, *supra* note 4, Annex III, art. 8.

80. *Id.*

81. *Id.*

82. The mandatory transfer of technology will remain a requirement for ten years after the Enterprise begins commercial production. *Id.* Annex III, art. 7.

83. *Id.* Annex III, art. 5.

84. *See, e.g.,* Bandow, *supra* note 13, at 477.

85. *Id.* at 478.

86. *See id.* "The Reagan administration is no longer willing to cede the moral high ground, as it believes its principles of government and economics to be right and worth defending." *Id.*

87. *See* The Republican Party 1980 Platform, *reprinted in* 126 CONG. REC. 20, 616-37 (1980):

Multilateral negotiations have thus far insufficiently focused attention on U.S. long term security requirements. A pertinent example of this phenomenon is the Law of the Sea Conference, where negotiations have served to inhibit U.S. exploration of the seabed for its abundant mineral resources. Too much concern has been lavished on nations unable to carry out seabed mining, with insufficient attention paid to gaining early American access to it. A Republican Administration will

changes into the Convention. Given his pre-election posturing, President Reagan could not approve the signing of the Convention. The Reagan Administration considered the Convention's ideological flaws "largely a result of earlier concessions made by U.S. negotiators who, seeking to promote multilateral negotiation by negotiating a treaty for its own sake, underestimated the impact of Part XI on key national and strategic interests."⁸⁸

Among the ideological issues cited for the U.S. rejection of the Convention was the perception that the treaty restricts economic freedom in ways inconsistent with free market principles.⁸⁹ Such restrictions include those Articles of the Convention that limit entry into the market,⁹⁰ set a ceiling on annual production,⁹¹ and mandate a transfer of technology.⁹² Despite domestic and international criticism that the alternative to the Convention, the Provisional Understanding, is isolationist and that the Convention's objectionable features are unlikely to be invoked to restrict U.S. mining interests,⁹³ the United States has steadfastly rejected such perceived economic restrictions.⁹⁴

The United States also objects to a perceived distortion of the "common heritage of mankind" doctrine. The Reagan Administration contends that this concept, as applied by the developing countries within the context of the Convention, provides nations which would otherwise play no role in seabed development with an equal say in governing the seabed, and permits them to profit undeservedly from Western exploration and exploitation of the Area. Consequently, while the United States favors international agreement and coopera-

conduct multilateral negotiations in a manner that reflects America's abilities and long-term interest in access to raw materials and energy resources.

Id.

88. Malone, *The United States and the Law of the Sea*, 24 VA. J. INT'L L. 785, 796 (1984); see also Ratiner, *The Law of the Sea: A Crossroads for American Foreign Policy*, 60 FOREIGN AFF. 1006, 1008 (1982). The Convention "was incompatible with President Reagan's apparent desire to return the United States to a period of power and influence in world affairs in which its policies would simply be enunciated rather than sold to others through a process of diplomacy and negotiation." *Id.* (Mr. Ratiner, Deputy Chairman of the U.S. Delegation to the Final Negotiating Session of UNCLOS III, was a participant in the Reagan Administration's review of the Convention).

89. Bandow, *supra* note 13, at 480.

90. Convention, *supra* note 4, art. 151, paras. 2-3.

91. *Id.* art. 151, paras. 3-4.

92. *Id.* Annex III, art. 5.

93. See *infra* text accompanying notes 148-64, 126-45.

94. See Malone, *The United States and the Law of the Sea After UNCLOS III*, 46:2 LAW & CONTEMP. PROBS. 29, 32 (1983).

The United States has a right to insist upon international mechanisms and policies that are consistent with our free market and democratic principles. It is because of these principles that America obtained her present wealth and high standard of living—it is these same principles which will promote international growth and freedom.

Id.

tion in defining the appropriate guidelines for seabed development, it will not accede to a treaty under which "the developing states may assert many rights, but . . . are burdened with very few reciprocal obligations."⁹⁵

The Reagan Administration is further concerned that accepting the Convention will have the precedential effect of legitimizing the New International Economic Order (the "NIEO").⁹⁶ The Group of 77 views the Convention as a crucial opportunity to initiate the establishment of a more favorable international economic order.⁹⁷ Viewing the Convention as the first step in an ongoing effort to make the NIEO a characteristic of all international agreements and organizations, the Group of 77 became intransigent on those provisions most antithetical to free market principles.⁹⁸ Because those same provisions were contrary to the political and economic freedom that formed the basis of President Reagan's mandate on international relations and world economic development,⁹⁹ the U.S. delegation was equally intractable. As a result, the Convention contained provisions which the Reagan administration perceived as inimical to U.S. interests and therefore wholly unacceptable.

B. PRACTICAL OBJECTIONS

In addition to its ideological objections to the Convention, the Reagan Administration has also identified several flaws in the agreement that, notwithstanding any philosophical differences, mandate its rejection on practical grounds. First is the possibility of arbitrary or discriminatory licensing and a lack of assured access to specific seabed

95. *Id.*; see also Bandow, *supra* note 13, at 479-80.

96. See Bandow, *supra* note 13, at 486-87; Malone, *supra* note 88, at 796; Malone, *supra* note 94, at 31. The NIEO, as put forth in the U.N. General Assembly's Declaration on the Establishment of a New International Economic Order, is intended, *inter alia*, to "correct inequalities and redress existing injustices . . . eliminate the widening gap between the developed and developing countries . . . [and to give] preferential and non-reciprocal treatment for developing countries, wherever feasible, in all fields of international economic co-operation whenever possible . . ." Declaration on the Establishment of a New International Economic Order, May 1, 1974, G.A. Res. 3201, 6 (Special) U.N. GAOR Supp. (No. 1) at 3-5, U.N. Doc. A/9559 (1974), reprinted in 13 I.L.M. 715, 716, 718 (1974). Scholars are in general agreement regarding the NIEO's primary economic objectives: "[I]ncreasing LDCs' [Less Developed Countries'] control over their economic destiny; accelerating the LDCs' growth rate; tripling [sic] the share of global industrial production conducted in the LDC by the year 2000; and narrowing the gap in *per capita* income between the developed countries." Kreinin & Finger, *A Critical Survey of the New International Economic Order*, 10 J. WORLD TRADE L. 493, 493 (1976); see also Gamble & Frankowska, *International Law's Response to the New International Economic Order: An Overview*, 9 B.C. INT'L & COMP. L. REV. 257, 259 (1986).

97. Comment, *UNCLOS III: The Remaining Obstacles to Consensus on the Deepsea Mining Regime*, 16 TEX. INT'L L.J. 79, 81 (1981).

98. Malone, *supra* note 88, at 796.

99. See *supra* notes 86-88 and accompanying text.

mining sites. Although the access criteria detailed in the Convention are nondiscriminatory,¹⁰⁰ the United States fears that the licensing process could become politicized.¹⁰¹ The Convention's critics base this criticism primarily on the complex election procedures of the Council, the arm of the Authority responsible for licensing decisions.¹⁰² The United States also contends that the Convention's decision-making process imposes unnecessary regulation, bureaucracy, and risk. The architects of current U.S. ocean policy therefore argue that the Convention is too complex for a high-risk industry that has

100. Comment, *supra* note 97, at 103.

101. Bandow, *supra* note 13, at 484.

102. See *Seabed Council Seen as Hostile to Mining* (remarks of Brian Hoyle), in CONSENSUS AND CONFRONTATION: THE UNITED STATES AND THE LAW OF THE SEA CONVENTION 265 (J. Van Dyke ed. 1982) [hereinafter CONSENSUS AND CONFRONTATION].

The Council, the executive organ of the Authority, is composed of members elected by the Assembly. Article 161 provides in part:

1. The Council shall consist of 36 members of the Authority elected by the Assembly in the following order:

(a) four members from among those States Parties which, during the last five years for which statistics are available, have either consumed more than 2 per cent of total world imports of the commodities produced from the categories of minerals to be derived from the Area, and in any case one State from the Eastern European (Socialist) region as well as the largest consumer;

(b) four members from among the eight States Parties which have the largest investments in preparation for and in the conduct of activities in the Area, either directly or through their nationals, including at least one State from the Eastern European (Socialist) region;

(c) four members from among states parties which on the basis of production in areas under their jurisdiction are major net exporters of the categories of minerals to be derived from the Area, including at least two developing countries whose exports of such minerals have a substantial bearing upon their economies;

(d) six members from among developing countries, representing special interests. The special interests to be represented shall include those of States with large populations, States which are land-locked or geographically disadvantaged, States which are major importers of the categories of minerals to be derived from the Area, states which are potential producers of such minerals and least developed countries;

(e) eighteen members elected according to the principle of ensuring an equitable geographical distribution of seats in the Council as a whole, provided that each geographical region shall have at least one member elected under this subparagraph. For this purpose the geographical regions shall be Africa, Asia, Eastern European (Socialist), Latin America and Western Europe, and others.

Convention, *supra* note 4, art. 161.

Voting in the Council on matters of substance is to be by two-thirds of those present and voting. *Id.* art. 161(8). Its powers include the establishment of specific policies, the exercise of control over the Enterprise, the initiation of complaints before the Seabed Disputes Chamber, and the power to approve work plans submitted by states or their nationals for seabed mining permits. Such proposed plans are deemed to be approved unless rejected by a three-fourths majority within sixty days of the submission of the plan to the Council by the Technical Commission, a subsidiary organ of the Council. *Id.* arts. 162, 163, 165; see also Arrow, *The Proposed Regime for the Unilateral Exploitation of Deep Seabed Mineral Resources by the United States*, 21 HARV. INT'L L.J. 337, 396 & n.385 (1980).

never engaged in commercial production.¹⁰³ The United States simply refuses to trust an international seabed authority that "has no track record but has a massive bureaucracy."¹⁰⁴

A second practical objection of the United States concerns the production ceiling.¹⁰⁵ This "limitation" on seabed development is intended to allow terrestrial producers an interim period¹⁰⁶ to adapt to the increased supply of minerals resulting from seabed mining.¹⁰⁷ Objections to the Convention based upon the production ceiling, however, are virtually meritless. Even the Convention's critics often concede that market forces, not the production ceiling, will establish the level of production during the interim period.¹⁰⁸ Notwithstanding the production ceiling's liberal requirements, the United States claims the ceiling reflects a broader anti-production bias permeating the Convention. One critic¹⁰⁹ cites, as examples of this antiproduction bias, Convention provisions that call for "orderly, safe and rational management of the Area, . . . the promotion of just and stable prices remunerative to producers and fair to consumers, . . . [and] the protection of developing countries from adverse effects on their economies or export earnings resulting from . . . activities in the Area."¹¹⁰

A third practical objection to the Convention is its provision for mandatory transfer of technology.¹¹¹ Like the production ceiling, the practical effect of this provision is disputed.¹¹² Critics of the Convention concede that the circumstances for such transfers are limited and require reasonable commercial terms, but nevertheless argue that technology transfers under the Convention "could never be fair to private contractors."¹¹³

Furthermore, the United States believed that it could reject the Convention and yet be bound by, and benefit from, those Convention provisions advantageous to its interests.¹¹⁴ The United States claimed

103. *The U.S. Position on Deep Seabed Mining* (remarks of Brian Hoyle), in CONSENSUS AND CONFRONTATION, *supra* note 102, at 250. "We believe that regime set out in Part XI is massive overkill." *Id.*

104. *Id.* at 251.

105. Convention, *supra* note 4, art. 151, paras. 2-4.

106. *Id.* para. 3; *see supra* notes 56-57 and accompanying text.

107. Comment, *supra* note 97, at 104.

108. *Id.*; *see also infra* text accompanying notes 131-36.

109. Bandow, *supra* note 13, at 483.

110. Convention, *supra* note 4, art. 150, paras. (b), (f) & (h).

111. *Id.* Annex III, art. 5.

112. *See, e.g.,* Van Dyke & Teichmann, *supra* note 62; *see also infra* text accompanying notes 137-41.

113. Bandow, *supra* note 13, at 484.

114. These provisions include, *inter alia*, guaranteed passage through international straits and other zones of coastal jurisdiction; freedom of military and commercial navigation, as well as scientific research, in the exclusive economic zone; exploitation of non-living resources of the continental shelf and the continental margin; protection of marine environ-

“that these . . . benefits would be accepted by other nations because the treaty reflects custom—an accepted way of formulating international law.”¹¹⁵ Others argue, however, that the Convention was negotiated as a “package deal,” whereby no nation may accept selected elements while rejecting the whole.¹¹⁶

IV. RESPONSE TO THE UNITED STATES CRITICISMS OF THE LAW OF THE SEA CONVENTION

Aspects of the Convention undoubtedly conflict with U.S. free market philosophy. This conflict is not surprising because it is unrealistic to expect that an international agreement among so many nations will mirror the economic ideology of any single participant. Given the divergent goals of the world's nations, compromise on ideological issues is an essential element of virtually all treaties, particularly one as ambitious as the Convention. Since ideological concessions were inevitable in the Convention, the Administration erred in rejecting an agreement which offered the United States both opportunities for economic gain and stability within the world community.

The Administration's rejection of the Convention reflects a disappointing unwillingness to accept the contemporary world as one of global interdependence. The United States can no longer attempt to dominate world affairs simply by imposing its views on other countries. Only through multilateral fora can this era's most pressing world problems be adequately addressed.¹¹⁷

By failing to recognize this crucial geopolitical reality, the United States risks slipping “further into some form of international, political, economic, and social isolation with the image of an international outlaw or outcast.”¹¹⁸ In order to maintain and strengthen its position as a world leader, the United States must eschew this isolationist stance. UNCLOS III, the largest and longest United Nations Conference ever, was of particular importance to the Group of 77. The United States stood to gain a great deal in long-term international relations by being more open to compromise with the Group of 77.¹¹⁹ Instead, by

ment; management of the ocean's fisheries; and a comprehensive dispute settlement mechanism. See Arrow, *supra* note 102, at 408; McCloskey & Losch, *The U.N. Law of the Sea Conference and the U.S. Congress: Will Pending U.S. Unilateral Action on Deep Seabed Mining Destroy Hope for a Treaty?*, 1 NW. J. INT'L L. & BUS. 240, 241-46 (1979); Ratiner, *supra* note 88, at 1018.

115. Ratiner, *supra* note 88, at 1018.

116. See Arrow, *supra* note 102, at 407-13; Ratiner, *supra* note 88, at 1018-19; see also *infra* text accompanying notes 144-46.

117. See Address by Elliot L. Richardson, *Interdependence x Political Necessity—The Need for Law*, 1981 PROC. AM. SOC'Y INT'L L. 206 [hereinafter Richardson Address].

118. Larson, *The Reagan Rejection of the U.N. Convention*, 14 OCEAN DEV. & INT'L L.J. 337, 356 (1985).

119. See Arrow, *supra* note 102, at 414.

rejecting the treaty, the United States has sent a signal that the Third World may interpret as illustrating not only economic greed, but also resistance to the notion of sovereign equality.¹²⁰

The United States should exhibit more willingness to engage in meaningful multilateral negotiations toward binding international obligations, even at the expense of ideological purity when practical U.S. interests are not compromised significantly.¹²¹ Absent a genuine desire by the United States to participate in fruitful international negotiations, developing nations have little reason to seek U.S. leadership and guidance in world affairs. In criticizing the Convention, a Reagan Administration official contended that rejecting the Convention "would help forestall the creation of other negotiating forae and international structures to regulate other international economic issues."¹²² This lamentable blindness to the implications of global interdependence threatens U.S. influence in the Third World vis-a-vis the Soviet Union. Indeed, the deadlock on ideological issues that characterized the dialogue between the West and the Group of 77 at UNCLOS III was "exploited by the Soviet Union as a means to consolidate its influence with the 'non-aligned nations' and to isolate further the United States and its allies within the 'world community'."¹²³

Clearly, the Convention contains provisions at odds with U.S. economic philosophy. The Group of 77 used the "common heritage of mankind" doctrine to give developing countries a disproportionate voice in seabed development. In addition, the Convention can be viewed as moving toward a legitimization of the NIEO. The question remains, however, whether these philosophically objectionable inclusions necessarily required rejection of the Convention. Apparently, the Reagan Administration concluded that the ideological compromises in the Convention, when weighed against the forfeited practical benefits and the detriments of isolation within the world community, were sufficiently objectionable to warrant rejection of the treaty. In rejecting the Convention, the United States risks that upon ratification of the Convention, many nations will realize they can shape important international policy without U.S. participation.¹²⁴ This realization will ultimately lessen the ability of the United States to influence future multilateral negotiations.¹²⁵

120. *Id.*

121. Richardson Address, *supra* note 117, at 210.

122. Bandow, *supra* note 13, at 487.

123. Malone, *supra* note 88, at 797; *see also* Charney, *supra* note 74, at 51.

124. Ratiner, *supra* note 88, at 1020.

125. *See* Richardson, *supra* note 14, at 10; *see also* Ratiner, *supra* note 88, at 1020: "In short, the guardians of pure conservative ideology may have won a battle when the United States stood alone at the Law of the Sea Conference, but the United States may lose a very important war." *Id.*

The U.S. insistence on ideological purity is isolating it from much of the world community and demonstrates a reluctance to engage in meaningful and binding international negotiations. Such rigidity would be justified if the United States deemed the Convention inimical to U.S. mining interests from a practical perspective. Such a functional evaluation of the Convention¹²⁶ reveals, however, that the practical objections to the Convention were not so weighty as to justify rejection.

To satisfactorily protect mining interests, the Convention must include provisions which guarantee potential miners assured access to selected sites. Under the Convention, the Council will be responsible for licensing. Although the Council's election procedures are complex,¹²⁷ the actual process for contract approval is "well-nigh automatic," if the applicant is sponsored by a state party and meets various financial and technical requirements.¹²⁸ The Legal and Technical Commission, a fifteen-member panel elected by a three-fourths majority of the Council, approves all work plans.¹²⁹ Notwithstanding the complexities that characterize the licensing agencies, "the automaticity of the system could only be frustrated if three-fourths of the Council made a conscious and determined effort to elect unsuitable Commission members who would ignore the requirements of the . . . Convention."¹³⁰ Perhaps more importantly, once the Council approves a mining plan, the miners will operate with the sanction of virtually the entire world community. Fundamental to the notion of assured access is a regime whereby specific mining rights are recognized by all potential miners. Unlike the Provisional Understanding, the Convention contemplates such a regime.

Two additional practical objections to the Convention by the United States, regarding the production ceiling and the transfer of technology provisions, are likely "more apparent than real."¹³¹ These provisions will probably never inhibit U.S. seabed mining. Whether the production ceiling will have any practical effect has been repeatedly questioned.¹³² The authors of a recent study conclude that the production limitation is set sufficiently high as to have no probable

126. For an argument in favor of a purely functional evaluation, see Katz, *supra* note 7.

127. See *supra* note 102.

128. Richardson, *supra* note 18, at 442.

129. Convention, *supra* note 4, art. 163, para. 2.

130. Richardson, *supra* note 18, at 442.

131. Bailey, *supra* note 58, at 74; see also Richardson, *supra* note 18, at 443-44.

132. Although the production ceiling is effective for an interim period of twenty-five years, it will only effect those commercial mining projects operating during the industry's first fifteen years. Because the interim period begins five years before commercial production begins, it covers only twenty years of production. In addition, contracts signed in the last five years of the interim period can call for production to begin after the production ceiling expires. Richardson, *supra* note 18, at 444 n.21.

effect on commercial production.¹³³ This conclusion accords with the U.S. State Department consistently maintained projections.¹³⁴ Under the Convention regime, the level of seabed mineral production will be set, in all likelihood, not by any artificially imposed limitations, but rather by market forces. Seen in this light, the production limits are not, in a practical sense, objectionable. The first policy objective listed in Article 150, calling for "the development of the resources of the Area,"¹³⁵ undercuts the contention that the Convention has an anti-production bias. Indeed, the sequence and wording of the final text of Article 150 represents a concession by the Group of 77, making commercial development of the Area a central goal. This objective was expressed only with some qualifications in previous drafts.¹³⁶ The final draft unambiguously states the developed countries' goal of commercial development.

The provision for the transfer of technology¹³⁷ is similarly limited in its potential practical effect. Sales of technology are mandated only upon a showing that the equipment or its equivalent is unavailable on the open market.¹³⁸ Current projections indicate that the necessary seabed mining technologies will be generally available for open market purchase.¹³⁹ Even if a sale is mandated, it must be on fair and reasonable commercial terms.¹⁴⁰ Moreover, the technology transfer provision expires ten years after the Enterprise has begun commercial production.¹⁴¹

Unfortunately, despite their limited potential effect, the United States viewed these provisions as fatal to the Convention. Rejecting an agreement with so many favorable features¹⁴² because it contains a limited number of arguably objectionable clauses unlikely to effect U.S. mining interests must be seen as highly questionable at best.¹⁴³

133. Antrim & Sebenius, *supra* note 58, at 79-99. (Evaluation of the potential commercial effects of the production ceiling, transfer of technology, and other provisions found objectionable by the Reagan administration reveals that "significant deterrence of ocean mining is unlikely to occur, at least through the first two decades of the next century.")

134. See Katz, *supra* note 7, at 129 & n.96.

135. Convention, *supra* note 4, art. 150(a).

136. Unlike earlier drafts, the final Convention text separates subparagraph (a) from subparagraph (b) (which calls for controlled development of the Area), thereby allowing the first goal listed to encourage unqualified Area development. Convention, *supra* note 4, art. 150(a), (b); see also CONSENSUS AND CONFRONTATION, *supra* note 102, at 270-71 & n.20.

137. Convention, *supra* note 4, Annex III, art. 5. See generally Van Dyke & Teichmann, *supra* note 62 (overview of the Convention's technology transfer provisions).

138. Convention, *supra* note 4, Annex III, art. 5, para. 3(a).

139. Antrim & Sebenius, *supra* note 58, at 79-99.

140. Convention, *supra* note 4, art. 144, para. 2(b); Annex III, art. 5, para. 3(a).

141. *Id.* Annex III, art. 5, para. 7.

142. See *supra* note 114.

143. Richardson, *supra* note 14, at 11-12. "It is odd that a country which invented pragmatism should let these objections stand in the way of the opportunity to engage in

Finally, the Reagan Administration's view that the United States could remain outside of the Convention, and at the same time claim to benefit from those favorable provisions has been repeatedly rejected.¹⁴⁴ The more persuasive position is that the Convention creates rights only for parties who assume responsibilities under it.¹⁴⁵ Given the weight of opinion to the contrary, the Administration may be gravely in error in assuming it can reject the Convention while remaining free to pick and choose among its benefits.¹⁴⁶ The resulting losses to the United States¹⁴⁷ are especially disappointing in light of the dubious foundation of the U.S. decision to reject the Convention.

V. THE PROVISIONAL UNDERSTANDING

Upon the failure of the Convention, eight Western industrialized nations¹⁴⁸ entered into the Provisional Understanding on August 3, 1984.¹⁴⁹ Although the Group of 77 immediately denounced the agreement as "wholly illegal,"¹⁵⁰ the Provisional Understanding is probably legal because it neither claims sovereignty or ownership over portions of the seabed, nor grants exclusive rights to any area of the seabed that are intended to be valid against the rest of the world.¹⁵¹ Notwithstanding its probable, albeit unsettled, legality, it is doubtful whether the Provisional Understanding creates a regime conducive to long term mining.¹⁵²

The Provisional Understanding is essentially a "nonpoaching" agreement, imposing upon its parties an obligation of self-restraint. The Provisional Understanding dictates that no party will engage or seek to engage in mining operations that would conflict with those of another party.¹⁵³ Each party agrees to respect the claims of the other parties and, consistent with the *res nullius* principle, each party recognizes that no state may claim sovereignty over any site.

The Provisional Understanding reflects its parties' disdain for the complex bureaucracy called for in the Convention. A remarkably lean agreement covering less than six pages, the Provisional Understanding is intended to assure unimpeded access to chosen mining sites. It

deep seabed mining when there is so little prospect that the treaty's objectionable features will ever have to be faced squarely." *Id.*

144. See, e.g., Arrow, *supra* note 102, at 407; Larson, *supra* note 118, at 353 & n.33; Ratiner, *supra* note 88, at 1018; Richardson, *supra* note 14, at 17 & n.33.

145. See Ratiner, *supra* note 88, at 1018.

146. *Id.*

147. See *id.* at 1018-19; Arrow, *supra* note 102, at 407-13.

148. See *supra* note 5.

149. See *supra* note 6.

150. *Seabed Mining Agreement Denounced*, WEST AFRICA, Aug. 27, 1984, at 1742.

151. Mashayekhi, *supra* note 17, at 248.

152. See *infra* text accompanying notes 163-85.

153. Provisional Understanding, *supra* note 6, para. 1.

emphasizes expediency, calling upon its parties to use "reasonable dispatch" in determining whether an application complies with the applicant's national law and is therefore eligible for an authorization.¹⁵⁴ When an application is accepted for an authorization, each party shall immediately notify the other parties of its action.¹⁵⁵ This notice requirement presumably will avoid the processing of multiple authorizations for a single site, because each party will have a perpetually updated record of authorized sites. The notice requirement should also obviate the need for post hoc determinations of priority among competing authorizations. The agreement also requires consultation among the relevant parties in the event that two or more overlapping applications are filed simultaneously.¹⁵⁶

To further encourage smooth development of seabed mining, the Provisional Understanding calls for extensive communication and cooperation among the parties. To eliminate conflict among development goals, the parties agree to consult before initiating seabed mining operations,¹⁵⁷ to ensure that no two parties will begin planning development of the same site. Similarly, the parties shall notify one another regarding any new domestic legal provisions or modifications of existing legislation,¹⁵⁸ and the parties shall consult together "generally with a view to coordinating and reviewing the implementation of [the] agreement."¹⁵⁹ In addition, the parties agree to maintain the confidentiality of the size and location of application areas,¹⁶⁰ as well as any "other proprietary or confidential commercial information received in confidence from any other Party in pursuance of cooperation in regard to deep seabed operations."¹⁶¹

The Provisional Understanding is in accord with free market ideology because it lacks any requirements for dual nominations, mandatory transfer of technology, or limitations on production. Theoretically, the agreement is fully satisfactory. Indeed, assuming that no party denounces the agreement wholly¹⁶² or as between one or more specific parties,¹⁶³ the Provisional Understanding would allow

154. *Id.* para. 2.

155. *Id.* para. 3.

156. *Id.* para. 5(2).

157. *Id.* para. 5(1)(a).

158. *Id.* para. 5(1)(c).

159. *Id.* para. 5(1)(d).

160. *Id.* para. 6(1).

161. *Id.*

162. *Id.* para. 14(1). "A party may denounce this agreement by written notice to all other parties . . . Such denunciation shall become effective 180 days from the date of the latest receipt of such notice." *Id.*

163. *Id.* para. 14(2). "A party may, for good cause related to the implementation of this Agreement, after consultation, serve written notice on another Party that, from a date not less than 90 days thereafter, it will cease to give effect to paragraph 1 of this Agreement

for a relatively stable development of the seabed—that is, if the eight parties to the agreement were the only nations interested in seabed mining. Unfortunately, the Provisional Understanding neglects to account for the rest of the world. It does not recognize or support any claim by non-party investors. Consistent with the U.S. position in rejecting the Convention, the Provisional Understanding contemplates a seabed mining regime which operates independent of most of the world community—countries interested enough in seabed mining to exhaustively negotiate Part XI of the Convention. Such an approach is at best questionable absent non-party mining; where potential miners exist outside of the agreement, it is unworkable.

VI. ANALYSIS

A. SHORTCOMINGS OF THE PROVISIONAL UNDERSTANDING REGIME

The isolationism upon which the Provisional Understanding is founded creates a serious obstacle to any stable system of seabed mining under the agreement. The fundamental question is how will the Provisional Understanding parties control seabed activities by non-party mining operations. The Provisional Understanding lacks any system of control over nations not party to the agreement. When non-parties, already hostile to the Provisional Understanding's "alternative" regime, poach upon mining sites claimed by parties to the Provisional Understanding, the parties will be faced with a difficult confrontation. The uncertain results of such likely confrontations makes mining under the Provisional Understanding extremely risky. Consequently, Western banks will be unwilling to finance seabed mining operations where assured access is not guaranteed. It is ironic that the United States sacrificed the numerous advantages of the Convention because it did not satisfactorily guarantee access only to enter into a regime where access is assured among only eight nations.

Increasing the riskiness and instability of mining under the Provisional Understanding is the possibility of a challenge by non-parties in the International Court of Justice (the "ICJ").¹⁶⁴ Such an action would not challenge the legality of the Provisional Understanding itself, but rather any mining undertaken outside of the Convention. For example, Tommy T.B. Koh, the second and last President of the Law of the Sea Conference, has stated that if the United States engages in seabed mining through an alternative regime, he will bring an action in the ICJ requesting an advisory opinion declaring such mining ille-

with respect to such other party. The rights and obligations of these two parties towards the other parties remain unaffected by such notice." *Id.*

164. *See infra* note 169.

gal.¹⁶⁵ Such an opinion would only be effective if the Provisional Understanding parties choose to comply with the Court's decision and enforce it domestically.¹⁶⁶ Although such domestic enforcement is discretionary,¹⁶⁷ David Colson, the State Department lawyer most directly involved in ocean affairs, believes that the United States would abide by a clear ICJ decision based upon legal reasoning rather than political factors.¹⁶⁸

The risk of an adverse ICJ decision and the parties' inability to exclude competing non-party claims makes the Provisional Understanding regime extremely uncertain. This uncertainty raises a paradox for the proponents of the free market approach. Given the high risk of seabed mining under the Provisional Understanding, Western banks will be unwilling to finance seabed activities under such a regime.¹⁶⁹ Therefore, to promote seabed mining, parties to the Provisional Understanding will need to provide either huge government subsidies, government insurance, or both. This compromise of free market ideals, however, is precisely the type of concession that made the Convention unacceptable to the Reagan Administration. Thus, the United States has sacrificed the seabed mining opportunities of the Convention, which were considered adverse to free market principles, for an agreement of suspect efficacy that will require similar ideological compromises. Although the Provisional Understanding ostensibly comports with the Reagan Administration's ideological requirements, in practice the agreement will require government involvement at a level incompatible with laissez-faire economic theory.¹⁷⁰

There are additional, more fundamental, flaws in the Provisional Understanding that may be problematic even within its contemplated eight-nation regime. Coordinating the parties' various domestic legislation on seabed mining will be difficult. The Provisional Understanding requires each party to act in accord with its national legislation.¹⁷¹

165. *The Dispute Will Be Submitted to the International Court of Justice* (remarks of Tommy T.B. Koh), in CONSENSUS AND CONFRONTATION, *supra* note 102, at 253; *see also* Ratiner, *supra* note 88, at 1017 ("The resulting protracted litigation would have a chilling effect on seabed mineral investment.").

166. Moss, *Insuring Unilaterally Licensed Deep Seabed Mining Operations Against Adverse Rulings by the International Court of Justice*, 14 OCEAN DEV. & INT'L L.J. 161, 175 (1984).

167. *Id.*

168. *Submission of the Issue to the International Court of Justice* (remarks of David Colson), in CONSENSUS AND CONFRONTATION, *supra* note 102, at 260. At the same time, however, Colson has expressed doubts that such an action would succeed. *Id.*

169. Molitor, *supra* note 25, at 601 ("Until the lending institutions [are] completely convinced that the industry [has] 'assured' access to a portion of the deep seabed large enough to maintain a commercially operative mining venture for 25 years, not one red cent [will] be approved." (footnotes omitted)).

170. *See infra* text accompanying notes 172-75.

171. Provisional Understanding, *supra* note 6, para. 9.

The agreement also dictates that the parties shall seek consistency in their application requirements and operating standards.¹⁷² Absent a multinational governing body to oversee seabed activities, coordinating the parties' seabed mining efforts will be quite difficult. Any such agency, however, would necessarily share some of the characteristics of the Authority, and therefore presumably be unacceptable.¹⁷³ Once again, the Provisional Understanding's practical application presents a departure from the parties' original free market motives. In fact, the agreement increasingly appears to mirror the Convention, but without the Convention's corresponding benefits. The inconsistencies within the regime that could result may prompt one or more parties to denounce the agreement.¹⁷⁴ Such action would add to the difficulties resulting from the parties' inability to monitor the activities of non-parties.

B. THE CURRENT U.S. POSITION

Although perhaps laudable for adhering to laissez-faire principles, the Provisional Understanding is unfortunately an agreement under which profitable long-term seabed mining is unlikely. By underestimating global interdependence in deep seabed matters, the parties to the Provisional Understanding have taken an unrealistic and provincial approach to a uniquely international issue. The Provisional Understanding offers the U.S. far less opportunity for successful commercial seabed mining than would a universally accepted U.N. Convention, especially in light of international hostility toward the Provisional Understanding's isolationist stance.

For example, a particularly troubling issue has been whether the U.S. mining concerns can generate the capital necessary to initiate full-scale seabed mining. Currently, estimates for such a project range from \$1 billion to \$2 billion.¹⁷⁵ Western banks will be unwilling to finance projects of this magnitude without the assurance of a regime that will foster profitable mining projects.¹⁷⁶ Although the Convention's critics contend that the Convention imposes too much regula-

172. *Id.* para. 8.

173. See *supra* text accompanying notes 100-04.

174. Provisional Understanding, *supra* note 6, para. 14; see also *supra* notes 162-63.

175. See McCloskey, *A View from the Hill—Reconciliation of Our Divergent Interests*, in WHAT LAW NOW FOR THE SEAS? 49, 54 (C. Maw ed. 1984) [hereinafter WHAT LAW NOW?] (\$1.5 billion estimate). Ten years ago, the industry average for the first operational system was estimated between \$500 million and \$750 million: \$25 million to \$50 million for exploration, \$100 million to \$150 million for research and development, and \$375 million to \$550 million for the prototype system (including miner and mining ship, processing, and transportation). *Deep Seabed Mining: Hearings Before the Subcomm. on Oceanography and the House Comm. on Merchant Marine and Fisheries*, 95th Cong., 1st Sess. 215 (1977).

176. Molitor, *supra* note 25, at 601.

tion and bureaucracy and therefore too great a risk,¹⁷⁷ proponents of the Convention argue that despite its shortcomings, the Convention at least guarantees that mining can take place under a regime universally recognized as legal.¹⁷⁸ In contrast, the Provisional Understanding guarantees noninterference only among its eight signatories. Given the large capital investments required, such a narrow guarantee of mine site security will probably be unsatisfactory to risk-conscious lenders.¹⁷⁹

It should be noted that retaliatory action by the Convention parties against mining conducted under the Provisional Understanding is highly likely, and that such hostility would be legitimized under article 137(3) of the Convention. The article provides that "no state . . . shall claim, acquire, or exercise rights with respect to the minerals recovered from the Area except in accordance with [Part XI of the Convention]."¹⁸⁰ Under this article, the Convention parties may ignore mining claims under the Provisional Understanding, and would arguably be within their rights to adopt confrontational measures aimed at protecting interests claimed under the Convention.¹⁸¹ The prospect of retaliation introduces additional risk,¹⁸² making the financing of min-

177. See *supra* notes 103-04 and accompanying text.

178. Richardson, *supra* note 10, at 508-09.

179. Leigh Ratiner, former Deputy Chairman of the U.S. Delegation on the Law of the Sea Conference, has summarized the primary practical obstacle to mining outside of the Convention:

[C]an a mining company get clear title to mineral resources on the deep seabed sufficient to take to the bank or to a Senior Vice President for Financial Affairs in his corporation, and obtain one-half billion dollars in 1980 dollars, or commitments to that amount, when 150-odd countries, give or take a few, say that claiming title to those resources is unlawful? In my judgment, it is inconceivable that any company will mine outside the Law of the Sea Treaty, and the United States mining companies are unlikely to do so because they have an attractive alternative available to them—and that is the prospect of mining under the flags of the countries who do sign the Law of the Sea Treaty, and therefore obtain reasonably clear title

I think that until the Administration can offer some showing of how secure, clear title can be given to a mining company outside the Treaty sufficient to impress financiers, the Administration has basically made a decision which is not only contrary to America's interest in direct access to strategic raw materials in the deep ocean, but the Administration has taken an action which is contrary to the interests of the mining companies as well, many of whom supported the Administration in this suicidal course of action.

Ratiner, *Where Do We Go From Here—Our Options and Alternatives*, in *WHAT LAW NOW?*, *supra* note 175, at 25-26.

180. Convention, *supra* note 4, art. 137(3).

181. Article 137(3) raises another issue, one beyond the purview of this Note: whether France, Italy, and the Netherlands—countries which also signed the Convention—acted in accordance with international law in signing the Provisional Understanding, an agreement under which parties may "claim, acquire, or exercise" rights with respect to Area minerals. *Id.*

182. See Ratiner, *supra* note 88, at 1017.

ing under the Provisional Understanding so unattractive that it will probably require government support.

The need for government intervention, whether in the form of subsidies or insurance, raises several difficult policy dilemmas, which transcend the threshold ideological difficulties associated with so obvious a departure from laissez-faire doctrine.¹⁸³ Most of these considerations will arise in regard to the scope of the government's involvement. First, as discussed above, the threat of on-site confrontations or ICJ interference would in all likelihood drastically increase the cost of the venture or possibly preclude private capital investment. This would require the Provisional Understanding parties to seek government intervention and support.

Second, any confrontation or retaliatory measures by Convention parties are likely to be aimed not only at seabed mining, but also at other activities of organizations mining under the Provisional Understanding. The Provisional Understanding parties will be forced to insure against losses resulting from blockades, sea-lane or strait interference, boycotts, or other economic sanctions against the non-seabed activities and assets of companies and banks engaged in such seabed mining.

Third, because of high costs, seabed mining projects are likely to be pursued by consortia of mining concerns from several countries. The United States and other Provisional Understanding parties would thus have to insure mining projects financed substantially with foreign capital. The United States would in effect be underwriting foreign business operations.

The precedential effect of such government intervention may be even more problematic for the United States and the other Provisional Understanding parties. The effect may create pressure to subsidize other risky undertakings.¹⁸⁴ It seems unlikely, however, that the United States will insure or subsidize projects of this nature, particularly those involving large amounts of foreign capital. Ironically, the U.S. insistence on laissez-faire principles regarding deep seabed mining led ultimately to an agreement under which massive governmental protection of not only American but also foreign investments may be unavoidable. The improbability of such protection effectively precludes the potential for United States commercial seabed mining under the Provisional Understanding.¹⁸⁵

183. See *supra* text accompanying note 170.

184. See Oxman, *The Two Conferences*, in *LAW OF THE SEA*, *supra* note 58, at 127, 142-43.

185. [I]f a company in my District, like Lockheed, which has been one of the [seabed mining] pioneers, came to me and said, "Can we afford to go forward under the existing domestic legislation?", I would say, "You should not invest \$1.5 bil-

C. FUTURE PROSPECTS

By displaying an unwillingness to bind itself by significant multi-lateral negotiations, the United States has alienated itself from much of the world. Furthermore, the potential for seabed mining under the Provisional Understanding is at best extremely limited. The opportunity to sign the Convention has passed,¹⁸⁶ and the United States may now only accede to the Convention through approval of two-thirds of the Senate.¹⁸⁷ Beyond the historical difficulty of such passage,¹⁸⁸ accedence is a less appealing way for the United States to become a party to the Convention, because by having so abruptly backed out at the scheduled signature date, the United States has weakened its bargaining position in future negotiations. Nevertheless, accedence is a more favorable alternative than the result of the current U.S. inflexibility: an attenuated ability to protect its non-seabed ocean interests, a tarnished image within much of the world community, and virtually no opportunity for profitable and unimpeded seabed mining.

The possibility that exploitation of seabed resources may not be feasible within the foreseeable future makes the U.S. rejection of the Convention even more disappointing. Recent developments indicate that seabed mining may have less potential profitability than was once thought.¹⁸⁹ Cheaper, less controversial land-based mining may be expanded to meet production needs. Indeed, no U.S. mining company

lion, because you have no guarantee against risk. I don't think in our lifetime you're going to see the Congress, particularly under the Reagan philosophy, move to subsidize U.S. industry or to give a guarantee against risk or to send the U.S. Navy out to protect a mining ship and two supply ships. It would seem to me that, under the law of the high seas, while you might have the right to mine, you have no right or no ability to protect yourself against others exercising their rights on the high seas.

So I would come down on the side that, while the [Convention] might be flawed, there is going to be no U.S. private investment or not U.S. Government action to subsidize or protect such private investment that will permit U.S. private investment to go forward.

McCloskey, *supra* note 175, at 49, 54-55 (Mr. McCloskey was a Congressman from the 12th District of California, Delegate to the Law of the Sea Conference, and Ranking Minority Member of the Merchant Marine & Fisheries Committee, U.S. House of Representatives).

186. The Convention remained open for signature until December 9, 1984. Convention, *supra* note 4, art. 305(2).

187. U.S. CONST. art. II, § 2, cl. 2.

188. The most prominent recent example of such difficulty is the United Nations Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, 78 U.N.T.S. 277, which the U.S. Senate recently ratified nearly 37 years after it was first submitted by President Truman. See N.Y. Times, Feb. 20, 1986, at A1, col. 1.

189. See, e.g., Goldwin, *Common Sense v. "The Common Heritage,"* in LAW OF THE SEA, *supra* note 58, at 59, 63-64 (citing the report of a Kennecott Consortium submission to the Special Standing Committee of the House of Commons: "Whilst it cannot be denied that the total content of the manganese, nickel, copper and cobalt in all the nodules in the oceans may be vast, most of this resource will be uneconomic for many decades—possibly centuries."); see also Drucker, *The Changed World Economy*, 64 FOREIGN AFF. 768, 769-

is currently considering full-scale commercial seabed mining.¹⁹⁰ If U.S. mining consortia decide not to pursue seabed mining, the U.S. decision to reject the Convention will become that much more lamentable. The United States will have lost the Convention's important benefits in navigation, environmental protection, and dispute resolution,¹⁹¹ in return for ideological purity within an industry that may never materialize.

United States' accession to the Convention would not only improve its position with regard to non-seabed concerns, but also would erect a universally accepted seabed mining regime, allowing the orderly development of commercial seabed mining if mineral prices recover and such mining becomes economically attractive. To promote seabed mining in the future, the United States should reconsider its position on the Convention, negotiate acceptable changes with the States Parties,¹⁹² and accede to the Convention.

Such negotiations should prove difficult for the United States.¹⁹³ Their urgency will be inescapable, however, once U.S. policy-makers realize that the Convention's non-seabed provisions and U.S. world leadership are too important to sacrifice, and that the Provisional Understanding regime will not foster seabed mining even if world economic conditions make seabed mining commercially attractive.

VII. CONCLUSION

The Law of the Sea Convention offered the United States an extraordinary opportunity. As a comprehensive treaty governing essentially all aspects of ocean law, the Convention would confirm the rights and responsibilities of all parties, and would lend stability to maritime activities and world order. Given its position as a world leader, the United States stood to benefit a great deal from this stabilization of global policy. The U.S. decision to reject the Law of the Sea Convention represents both missed opportunities and a diminution of our position as an architect of multilateral conduct. Worse, the United States has potentially alienated itself from much of the world community; furthermore, by contemplating undertakings at odds with the Convention, the United States risks damaging its image as a nation committed to international legal order.

73 (1986) (noting low price levels and accelerating decreases in demand for metals and mineral resources).

190. See Manheim, *supra* note 2, at 600.

191. See *supra* note 114.

192. Convention, *supra* note 4, arts. 312-314.

193. The last-minute decision by the United States not to sign the Convention may have alienated representatives of the developing countries, who may now hesitate to negotiate unless the U.S. is willing to accept a less advantageous regime than that of the Convention.

The rejection of the Convention apparently was based primarily on ideological, not practical, objections. The U.S. position reflects a failure to comprehend the reality of global interdependence and an unwillingness to fully appreciate the Convention's benefits. Ironically, the result of this misplaced emphasis on ideological purity—the Provisional Understanding—provides virtually no potential for commercial deep seabed mining and will require concessions to free market principles that are at least as incompatible with U.S. economic philosophy as any in the Convention.

In rejecting the Convention, the United States sacrificed valuable opportunities in seabed mining and many other aspects of maritime law. In return, the United States received increased isolation within the world community, the probable loss of the Convention's numerous favorable non-seabed provisions, and a seabed mining agreement that invites international confrontation while offering extremely tenuous mining prospects. Finally, even if mining under the Provisional Understanding is ever undertaken, it will require a betrayal of *laissez-faire* policies comparable to that in the Convention.

With all its shortcomings, the Provisional Understanding is unlikely to establish a regime conducive to commercial seabed mining. It is equally unlikely that the United States can persuade other potential seabed mining countries to believe otherwise. The inadequacies of the Provisional Understanding demand that we renegotiate, amend, and accede to the Convention. It is only under such a universally sanctioned treaty that a United States enterprise will ever successfully engage in deep seabed mining.

Steven J. Molitor